

***Nguyen v R* [2021] NSWCCA 118 (18 June 2021) – New South Wales Court of Criminal Appeal**

‘Application for leave to appeal against sentence’ – ‘Breach of protection order’ – ‘Children’ – ‘Damaging property’ – ‘Financial abuse’ – ‘Following, harassing and monitoring’ – ‘Kidnapping threat’ – ‘Physical violence and harm’ – ‘Pregnant people’ – ‘Separation’ – ‘Sexual and reproductive abuse’ – ‘Suicide threat’ – ‘Technology facilitated abuse’ – ‘Threats to kill’

Charges: Aggravated entry with intent to steal; Steal property in dwelling house; Intimidation; Form 1 offences attached to sequence 6 (Damage property, contravene Apprehended Violence Order); Section 166 Certificate (Dishonestly obtaining financial advantage by deception).

Proceedings: Application for leave to appeal against aggregate sentence.

Facts: The male applicant and the female complainant had been in a relationship, which had ended prior to the offending. While the complainant was at the hospital giving birth to their child, the applicant entered her home, damaged her car, ransacked her room, and stole her laptop. He sent her many threatening messages via text, WhatsApp and email (threats to kill, violent sexual assault, stalking, removal of child, suicide etc), including breach of a provisional Apprehended Violence Order (AVO). He also used the complainant’s laptop to access her personal MyGov account and make two fraudulent tax returns in the complainant’s name causing payments to be made to the applicant’s own bank account. The applicant was sentenced to an aggregate sentence of 7 years’ imprisonment with a non-parole period of 4 years 11 months.

Grounds of appeal:

1. The sentencing judge erred by failing to give proper practical effect to the finding of special circumstances.
2. The sentencing judge erred by taking into account the incorrect offence when dealing with the second offence on Form 1.
3. The aggregate sentence was manifestly excessive.

Held: Application for leave to appeal granted, appeal dismissed.

Ground 1: It was evident from the sentencing judge’s remarks that he gave proper effect to his finding of the basis for special circumstances by varying the statutory ratio downwards to 70%.

Ground 2: It was clear that the sentencing judge nominated the incorrect offence at a point in his reasons. However, while the Crown's submissions focused on whether the error vitiated the sentencing discretion, the true question in the circumstances here was whether the error was an inadvertent misstatement that did not affect the sentence imposed. The slip that occurred could not properly be characterised as a material error capable of vitiating the sentence imposed.

Ground 3: The aggregate sentence was not manifestly excessive in light of the fact that the applicant's criminality encompassed offences of a different nature and varying degrees of seriousness with multiple complainants. Relevant matters in relation to the sequence 6 offence (aggravated entry with intent to steal and the Form 1 offence) included at [107]:

- > The offences were committed in the context of a relationship marred by domestic violence. The applicant twice threatened to kill the applicant and had also threatened her with violent sexual assault and removal of her newborn baby.
- > It was significant that the applicant purposefully chose the complainant's home and attended at a time he thought she would be asleep and near to her giving birth.
- > The offence was not less serious because the duration of the entry was short.
- > The objective seriousness of the sequence 6 offence was at the middle of the range, noting the persons present were inherently vulnerable and the offence was not impulsive.
- > The offences involved an abuse of trust.
- > The applicant was a young man who had a prior record including offences of domestic violence perpetrated against the same complainant, which disentitled him to leniency, pointed to an increased need for specific deterrence and contributed to a finding that his prospects of rehabilitation were poor or guarded.
- > The need for general deterrence and the protection of the community.
- > The statistics did not point to the indicative sentence for sequence 6 being manifestly excessive.

The aggregate sentence was also appropriate in light of the circumstances of the other offending including at [108]:

- > The stealing offence was assessed as "falling slightly below the middle range of objective seriousness but not by much", due to the non-monetary value of the laptop which could be expected to contain personal information.
- > The intimidation offence was assessed as at the middle end of the range of objective gravity noting the conduct was premeditated and designed to instil further mental harm on the complainant, when the applicant was aware she had just given birth.
- > The sentencing judge found the dishonesty offences fell slightly below the middle range of offending given the multiple victims (the ATO and the complainant), and the applicant having exploited his

possession of the complainant's laptop (subject of the stealing offence) to perpetrate the fraud.

- > No challenge was made with respect to accumulation.
- > The two offences on the Form 1, particularly contravene AVO, required an increase to the penalty for the principal offence (sequence 6), to ensure personal deterrence and extract retribution.
- > The applicant showed little or no insight into the complainant's perspective and was not genuinely remorseful.
- > The applicant represented a medium risk of re-offending.
- > The challenge to a limited adjustment to the sentencing ratio for special circumstances was rejected.
- > There was no double counting.